June 21, 1989

The Honorable Judge Jim Garrison
Civil Courts Bldg.
421 Loyola Ave.
Room 210
N.O., La. 70112

8/30/89

Dear Judge Garrison,

My name is Charmaine Hostak. I am a 32 year old housewife and mother and average American citizen. I just felt that I had to tell you how much your book On Trail of The Assassins has affected me.

I was only a tot when President Kennedy was assassinated and far too young still to understand fully what was going on throughout the sixties when your investigation was going on. I, like everyone else, was fed the "fairy tale" the government put out, and like most I believed it. Also, like most I have come to realize however, that there

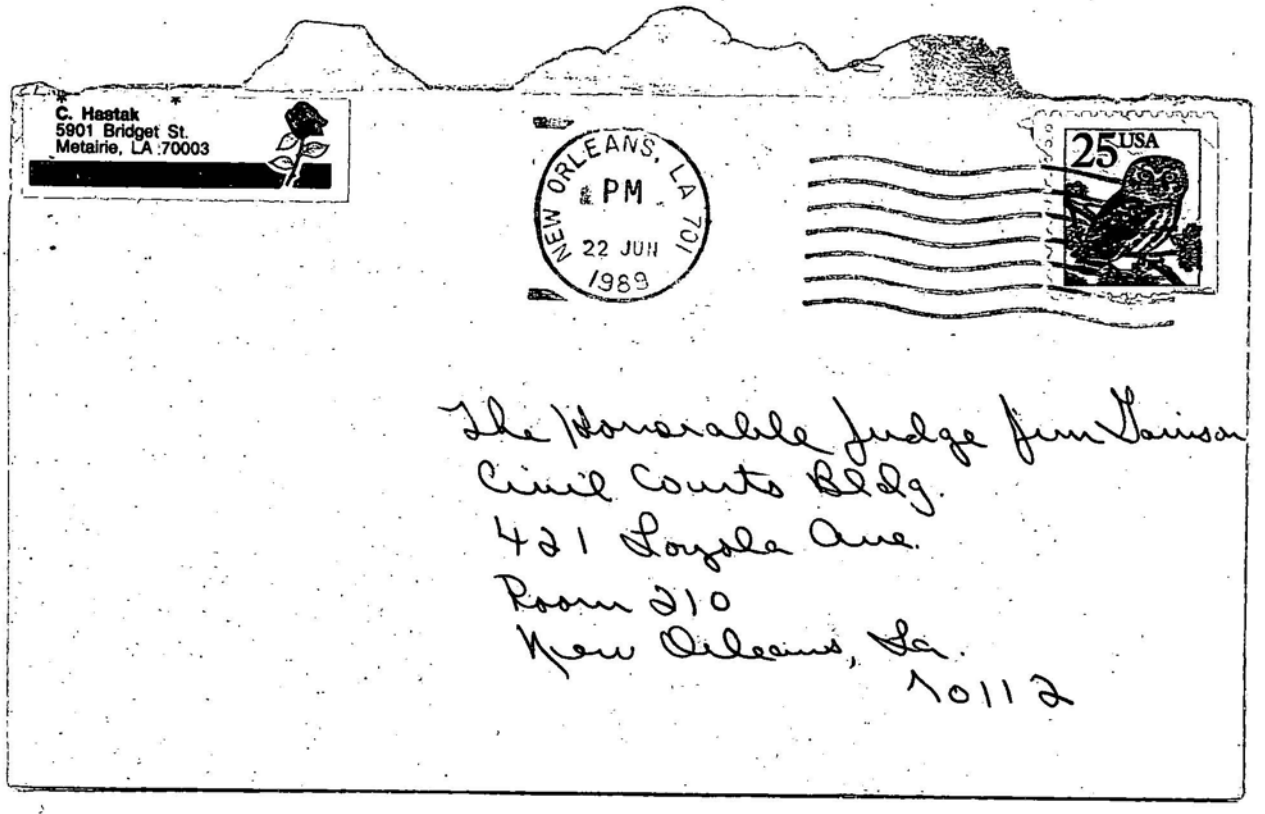
indeed had to be a conspiracy to accomplish such a feat. I could not in my wildest dreams imagine the scope of it all as presented in your book. I guess I grew up a naive little girl who believed the President is always a good man and the CIA, SS + FBI are also good people who are there to protect our government, our president and the people of this nation. I have lost something in a sense due to the revelations in your book, but I have also gained something much more - the truth. A ~~truth~~ truth that can only come from having your eyes wide opened which you have done for me. Of course, as you have mentioned in your book, recent events such as Watergate and the Iran Contra affair have helped to awaken the American people. But still to most the idea of the intelligence community killing it's own president is inconceivable.

I feel a sense of helplessness now because the vast majority of people still believe "the great lie". On history exams from coast to coast the correct answer to the question of "Who killed President Kennedy?" would still be "Lee Harvey Oswald". It is an outrage! Admittedly, it took me a while to get used to the fact that Oswald was a good guy working for the government and just a patsy - a scapegoat. The idea that the man I've been taught to believe actually killed the president did not even fire a shot was a bit overwhelming. The evidence you have presented in your book proves this fact beyond a doubt. I now feel that I would like to do something personally to bring the truth to the American People. What can one little person such as myself do against the powers that be?

I would like to commend your courage and perseverance in uncovering and exposing the truth. I would also like to thank you personally as one who felt frustrated that the truth would probably never be known. I only wish that there was someway to prove this to the people by a genuine government investigation to expose the truth, but that I fear you'll never see.

In closing I would just like to mention that from 1975-1979 I worked in the front office of the NOAC. I saw you in there quite alot - I believe you were working on one of your other books then. Many times as I would look at you across the front desk while I cashed a check for you, or whatever, I wished I'd had the nerve to bring up your investigation. I never wanted to bother you then but now I just had to tell you how much I admire you and your dedication to justice.

Sincerely,
Charmaine L. Hastak



The Honorable Judge Jim Garrison
Civil Courts Bldg.
421 Loyola Ave.
Room 210
New Orleans, La.
70112

O envelope

June 20,1989

Dear Mr. Garrison,

I've just finished ON THE TRAIL OF THE ASSASSINS and simply had to express my admiration and gratitude. Admiration because you really kept the reader out there on the chase with you. And gratitude for your efforts in tracking down facts people have been telling us for years 'we'd probably never know'.

In so many ways the assassins de-railed the country when they murdered the president. With a lot of luck and a few more patriots like you maybe we can someday get our country back.

Thankyou and congratulations

Tom Leopold

Court of Appeal

FOURTH CIRCUIT
STATE OF LOUISIANA
210 CIVIL COURTS BUILDING
421 LOYOLA AVENUE
NEW ORLEANS, LOUISIANA 70112

WILLIAM V. REDMANN
CHIEF JUDGE

JAMES C. GULOTTA
PATRICK M. SCHOTT
JIM GARRISON
DENIS A. BARRY
ROBERT J. KLEES
WILLIAM H. BYRNES, III
PHILIP C. CIACCIO
ROBERT L. LOBRANO
CHARLES R. WARD
DAVID R. M. WILLIAMS
JOAN BERNARD ARMSTRONG
JUDGES

DANIELLE A. SCHOTT
CLERK OF COURT

December 16, 1986

Ms. Kathy Kiernan
Assistant to Mr. Philip Pochoda, Publisher
PRENTICE HALL PRESS
c/o Gulf & Western Building
One Gulf & Western Plaza
New York, New York 10023

Re: COUP D'ETAT

Dear Kathy:

Enclosed you will find a new Title Page along with an updated Table of Contents which contains the ultimate chapter titles.

In addition, enclosed is the material which you requested: Pages 35 of Chapters 1, 3 and 4. Also enclosed are the requested footnotes for Chapter One, Two (updated), Three, Four (updated) and Five.

I also enclose an updated version of Chapter Two which I have revised in order to make the description of President Kennedy's neck wound more accurate.

Sincerely

Jim Garrison

Enclosures

COPY (F)

Court of Appeal

FOURTH CIRCUIT
STATE OF LOUISIANA
210 CIVIL COURTS BUILDING
421 LOYOLA AVENUE
NEW ORLEANS, LOUISIANA 70112

December 15, 1986

Mr. Philip M. Pochoda
Publisher, Editor-in-Chief
PRENTICE HALL PRESS
c/o Gulf & Western Building
One Gulf & Western Plaza
New York, New York 10023

Re: COUP D'ETAT

Dear Phil:

Enclosed is Chapter 13 -- the last chapter of the book -- along with the footnotes.

I had in mind a summarizing chapter but I decided that this was no time to write a dull one. I believe that the way it turned out is more provocative and yet very relevant. At least, so it seems to me.

Kathy called and gave me a list of pages and notes which are missing. We are getting these together and should have them off to you quickly. (All of my material, for security reasons, is not located in one place. In fact, with the acquisition of a paper shredder, we have become a small counter-intelligence agency).

I am delighted to learn that Sylvia Meagher is going to help with the book.

Regards,

Enclosures

cc: Mr. Peter Miller
Peter Miller Agency, Inc.

Court of Appeal

FOURTH CIRCUIT
STATE OF LOUISIANA
210 CIVIL COURTS BUILDING
421 LOYOLA AVENUE
NEW ORLEANS, LOUISIANA 70112

WILLIAM V. REDMANN
CHIEF JUDGE

JAMES C. GULOTTA
PATRICK M. SCHOTT
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JOAN BERNARD ARMSTRONG
JUDGES

DANIELLE A. SCHOTT
CLERK OF COURT

November 20, 1986

Mr. Philip M. Pochoda
Publisher, Editor-in-Chief
PRENTICE HALL PRESS
c/o Gulf & Western Building
One Gulf & Western Plaza
New York, New York 10023

Re: COUP D'ETAT

Dear Phil:

Enclosed is Chapter 12.

Of course, it is far too long. My original objective in so completely re-writing it was to show, in the penultimate chapter, what really had never fully been brought out effectively before. I wanted to show in detail how the effort to incriminate Oswald, with regard to Officer Tippit's murder, could be seen as clarifying the major project (in which the assassination sponsors and the Dallas homicide unit, under Captain Fritz, so clearly had worked together).

However, what I might have more successfully succeeded in showing is that it takes a lot of pages to describe the deception involved. I also succeeded in showing, undeniably, that ultimately a writer needs an editor.

Nevertheless, I don't believe the effort was wasted. I think you will find some interesting material in Chapter 12. Footnotes to follow in a few days.

Sincerely,

Enclosure

P.S. Perhaps, one of the solutions to cutting the chapter's length is to move the Section concerning the origin of "A. Hidell" forward to an earlier location, where the meandering anecdote will not use up so much space in such an important chapter as this one, which immediately precedes the final summing up.

Court of Appeal

FOURTH CIRCUIT
STATE OF LOUISIANA
210 CIVIL COURTS BUILDING
421 LOYOLA AVENUE
NEW ORLEANS, LOUISIANA 70112

WILLIAM V. REDMANN
CHIEF JUDGE

JAMES C. GULOTTA
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CHARLES R. WARD
DAVID R. M. WILLIAMS
JOAN BERNARD ARMSTRONG
JUDGES

DANIELLE A. SCHOTT
CLERK OF COURT

November 14, 1986

Mr. Philip M. Pochoda
Publisher, Editor-in-Chief
PRENTICE HALL PRESS
c/o Gulf & Western Building
One Gulf & Western Plaza
New York, New York 10023

Re: COUP

Dear Phil:

Thank you for your letter, which I received today.

I have no objection whatsoever to the confirming research being done by Sylvia Meagher. With regard to the Warren Commission (as well as the House Sub-Committee on Assassiations), she is not merely an acknowledged expert -- but the acknowledged expert. I have admired her for her scholarship a long time and continue to do so.

I was concerned, however, when she first was proposed because she has on several occasions expressed some hostility toward me -- for reasons quite obscure to me. However, if it is felt that this will not interfere with her objectivity with regard to the work product -- and I do not see why it should -- then she should be excellent.

I hope she is amenable because I would choose her for her intellectual honesty.

Sincerely,

cc: Mr. Peter Miller
PETER MILLER AGENCY, INC.

Prentice Hall Press
A Division of Simon & Schuster, Inc.

November 11, 1986

Jim Garrison
Court of Appeal, Fourth Circuit
State of Louisiana
421 Loyola Avenue, Room 210
New Orleans, LA 70112

Dear Jim Garrison,

(And I would love to write "Jim" if you will write "Phil.")

I am pleased to receive your revised chapters in good time. As soon as I receive the final chapter, I will begin my intensive editorial review.

As to the outside vetting: I am, as I wrote with the contract, committed to having the book read by an acknowledged expert on the assassination, one unburdened by previous political committments. Of the three names I had submitted to you, Peter Miller tells me that you have an objection to Anthony Summers. I am happy to honor that, and will, therefore, use either Sylvia Meagher (who everybody seems to agree has the greatest grasp of all the relevant events and personalities) or Peter Dale Scott, if either is amenable. I am sure that the list of six names you proposed to me can be of substantial help later in promoting the book, but I do not think they will serve the current purpose of disinterested critical readers.

Very truly yours,

Phil

Philip M. Pochoda
Publisher, Editor-in-Chief

cc: Peter Miller

THE LOUISIANA MINERAL LEASE

JAMES C. GARRISON

CONTENTS.

THE LOUISIANA MINERAL LEASE

A consideration of its nature and place in the property structure of the State

By

JAMES C. GARRISON, LL.B., M.C.L.

NEW ORLEANS
1956

The term "lease" describes a long established transaction in the property systems of both the common law and the Civil law. It is also used to identify the distinctive and relatively modern legal instrument through which the oil and gas operator acquires the privilege of attempting mineral production from another's land and of retaining a substantial portion of that which is produced. The relationship thus set up is the necessary result of the fact that the technical knowledge, the expensive equipment, and the financial resources incident to exploration and drilling for petroleum are seldom in the same hands as the land which harbors the mineral. Because the operator has no really close counterpart in the prior economic structures out of which the law has developed, some difficulty has accompanied the classification of this instrument of recent arrival. The solution has largely been by reference to one of the categories of the property order settled before the arrival of petroleum as an industry.

A near relative, and also born of unique economic requirement, is the mineral "deed" or conveyance. The difference between the lease and the sale of mineral rights, from the point of view of the interest granted, might be broadly generalized by saying that the latter transaction has a more permanent effect. However, the variety of opinion from one jurisdiction to another makes such a sweeping description of little value.[1] For this reason

[1] In Texas and Mississippi, for example, the lease grants an estate in fee simple. It is, however, a fee simple which is exposed to a limitation, and thus is a "determinable" one. See Stephens County v. Mid-Kansas Oil & Gas Company, 113 Texas 160, 254 SW 290 (1923) and Stokely v. State ex rel Knox, Attorney General, 149 Miss. 435, 115 So. 563 (1928). See also: Walker, Nature of the Property Interests Created by an Oil and

a consideration of the nature of the leasing arrangement should include an examination of the fundamental theories of ownership which underlie and influence contracts anticipating search for and discovery of oil.

I. OWNERSHIP OF MINERALS.

The "ownership" doctrine of mineral interests prevails in the majority of oil States, which is to say that these jurisdictions regard oil and gas as being receptive to ownership in place and prior to possession, by analogy to the more solid minerals of the earth. The other States maintain that, because of its possibly fugacious character, petroleum can not be owned before the physical reduction to possession. The former jurisdictions may be divided into those which regard the ownership as absolute[2] and those which regard it as qualified. The distinction is not too vital as each view sees the estate as corporeal, but the "qualifying" States emphasize the relative mobility of this particular mineral by taking the position that since one would no longer own the gas and oil if it should move away, then one can never have a full degree of ownership.

Gas Lease in Texas, 7 Texas L. Rev. 539 (1928); Comment, 13 Miss. L. J. 427-44; and Comment, 19 Miss. L. J. 291 (1947-1948). On the other hand, in Louisiana the *sale* of mineral rights gives one but a right of servitude subject to expiration following ten years non-use. See Frost-Johnson Lumber Co. v. Sallings' Heirs, 150 La. 756, 91 So. 207 (1922).

[2] In the States where ownership of oil and gas is absolute, two alternatives are possible as to what is granted by the lease. The instrument may grant a profit a prendre or it may grant what would be impossible in non-ownership jurisdictions—namely, a corporeal estate. The difference is not in the time limitation, for a profit a prendre need have none, but is in the fact that to receive the lease which grants the corporeal estate is to acquire title to real property.

It has been said[3] that the diversity of common law opinions regarding oil and gas ownership would have long since passed away had the "correlative rights" conception by which oil production is increasingly becoming controlled been earlier understood and applied to ownership. A new system built upon collective ownership of the pool by the various surface owners might have grown up. However, such did not develop to be the property law. Rather, the highly individualistic rule of capture was, from the start, the basic conception for determining ownership of the oil and gas.[4] This is still the controlling theory in most jurisdictions today.

However, in Louisiana there has been accomplished a method of collective ownership of the pool[5] which parallels the modern geological understanding that an oil reservoir is "a natural unit in which the common supply of oil and gas accumulated during geological periods without respect to surface property lines and

[3] Glassmire, Law of Oil and Gas Leases and Royalties (1938), p. 31 et seq.

[4] Under this "rule", landowner A may, through a well on his property, remove oil and gas from the domain of adjoining landowner B. It is interesting to note that certain provisions of the Louisiana Civil Code correspond quite closely to this common law idea of capture. Article 3415 provides: "Wild beasts, birds, and all the animals which are bred in the sea, the air or upon the earth, do, as soon as they are taken, become instantly by the law of nations the property of the captor; for it is agreeable to natural reason that those things which have no owner shall become the property of the first occupant." Article 3420 describes a rule of capture in which discovery, rather than possession, is the test: "Those who discover or who find precious stones, pearls and other things of that kind, on the sea shore or other places where it is lawful to search for them become masters of them." This article, applied to oil and gas exploration conceivably could have supported an extension of the idea of capture —that title to an underlying reservoir becomes his who discovers it.

[5] See Louisiana Act No. 157 of 1940, Section #9.

fences."[6] Under this system of unitized operation the various property owners share proportionately the oil removed from the reservoir. An even broader concept of collective ownership which might have emerged—development through concession—failed to become established in this country.[7]

The actual application of the ownership and non-ownership ideas described above may be seen in the adjoining States of Texas, Louisiana and Mississippi. Texas represents the extreme view of absolute ownership of minerals separate from the earth, and Mississippi has modeled itself after Texas.[8] In Louisiana there is no

[6] Quoted from "Oil and Gas Production; An Introductory Guide to Production Techniques and Conservation Methods", compiled by the Engineering Committee, Interstate Oil Compact Commission, and published by the University of Oklahoma Press (1951).

[7] In France by an act of 21 April, 1810, it was provided that while the surface owner "owned" all that lay beneath, only the State could exercise control over its disposition. Consequently, development of the minerals required a concession from the State. See Amos and Waldren, Introduction to French Law (1935), pages 91, 92. See Article 552, The French Civil Code, translated by Cachard (1930) concerning the restrictive effect of mine regulations upon ownership. At Roman law the landowner originally had exclusive rights with reference to mines, but in time it became necessary to pay a toll to the emperor. See Cooper's Institutes of Justices, page 462, quoting in translation from the Digests 7.1.13.5 (published by J. T. Voorhis, New York, 1852).

[8] See Stephens County v. Mid-Kansas Oil and Gas Company, supra note 1, and Stokely v. State ex rel Knox, Attorney General, supra note 1. Also see Koenig v. Calcote, 25 So. (2d) 763. But see Pace v. State, 4 So. (2) 270 (1941). Texas and Mississippi are among the few States in which the mineral lease grants an estate of such high degree. Specifically, a "determinable fee" is seen as granted, which means that the estate is as one in fee simple but for the possibility of determination upon the occurrence of an event. Both States rejected the profit a prendre alternative, the latter using as its springboard the basic Texas decision cited in note 1 supra. In Mississippi, it was found in Stern v. Great Southern Land Company, 148 Miss. 649, 114 So. 739 (1927), that mineral interests generally could be separately owned, and in Stokely v. State ex rel Knox, Attorney General, supra note 1, that the mineral lease vested title to the petroleum below.

separate ownership although the underlying theory for this is not the same as in the other jurisdictions maintaining that view.

a. The "ownership" concept.

The concept of separate ownership of minerals, however, did put in a relatively early appearance in Louisiana mineral law. In the 1918 case of *De Moss v. Sample et al*,[9] the Supreme Court held that the elements of ownership in land could be severed, and that the oil, gas and mineral rights could be excepted from a sale so that their title remained in the former landowner. The court indicated that while ordinarily the oil and gas in the earth were not the subject of separate ownership, the owner "may dismember his ownership and sell his land, excepting and reserving to himself, the oil, gas and mineral rights therein. Or he may sell the coal to one, iron to another, and so on."

The court seemed to suggest that the difference between a sale and a lease of mineral rights should be that in the former instance an ownership distinct from that of the surface was granted. A previous enunciation against the ownership theory in the decision of *Rives v. Gulf Refining Company of Louisiana*,[10] it dismissed as limited to the lease involved in that case.

The vendors in the *De Moss* case, had segmented the property into horizontal planes, giving the plaintiff all surface rights and keeping for themselves certain planes

[9] 143 La. 243, 78 So. 482 (1918).

[10] 133 La. 178, 62 So. 623 (1913).

below. It is common, the court commented, for a landowner to convey coal or other minerals below the surface, and in such cases the seller still owns "from the center of the earth to the bottom of the part sold. . .and from the top of the part sold to the clouds."

And the following year, in *Calhoun v. Ardis*[11], when the plaintiff contended in his petition that it was not legally possible for land to be sold separately from the oil and gas below it and that oil and gas were not capable of ownership before reduction to possession, the Supreme Court rejected the argument without dissent, replying:

> Whatever doubt may have existed in this State as to the right of an owner of lands to dismember the property and vest the ownership of the soil in one person, and that of the minerals which might be situated beneath the surface of the soil in another person, or retain it in himself, was definitely set at rest by the decision of this court in the case of *De Moss v. Sample*. That decision controls the present case; it is sound and logical, and further consideration only serves to convince us of our correctness.

But this firm stand was the court's last in defense of separate ownership, and that position was subsequently undertaken only by the argument of an unsuccessful litigant or in a dissenting opinion.

A detailed argument for application of the ownership theory was made in the partial dissent of Chief Justice Monroe, in the 1921 rehearing of *Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co.*[12] The majority opinion had

[11] 144 La. 311, 80 So. 548 (1918).
[12] 149 La. 100, 88 So. 723 (1921).

concluded that the deed involved in the case conveyed not ownership of the "fugitive" minerals, but only the real right of entering and exploring. It had stated that oil and gas ownership was not consistent with the "primary" definition of ownership given in Article 488 of the Civil Code providing that:

> Ownership is the right by which a thing belongs to someone in particular, to the exclusion of all other persons.

With this view Monroe's dissent clashed. Regardless, he declared, of what the recent legislation in Indiana or other States provided, for more than a century the Louisiana law has said that "the ownership of the soil carries with it the ownership of all that is directly above and under it." This language he regarded as too plain to allow the exclusion of oil and gas from its coverage. Any change would have to be brought about by the Legislature.

Furthermore, Monroe, contended, in Louisiana minerals have been found neither at large nor in reservoirs of such a nature as to permit substantial freedom of movement. The manner of confinement of a particular mineral formation is a question of fact and not well enough known nor sufficiently agreed upon publicly to be regarded as a matter for judicial cognizance. Even assuming that the minerals do shift from one place to another, he continued, and consequently become the property of different persons at different times, the courts should decide each problem as it arises instead of going so far as to deny the susceptibility to ownership of property which has been declared to have that attribute. He pointed out that fish,

bees and pigeons can change their ownership with great frequency, citing Civil Code Article 519[13] as an example of the "primary" definition of ownership giving way to other considerations. Thus, he argued, Article 488 was not to be regarded as the Code's only definition of ownership.

He indicated that in other jurisdictions there is "absolute" and "conditional" ownership (as in Louisiana, under Article 490 of the Civil Code there is "perfect" and "imperfect" ownership). As we have imperfect ownership for things not yet existent—unborn animals and future crops,[14] for instance—so can we have it for things the existence of which, although real, is yet unknown.

Chief Justice Monroe closed his argument for the application of the ownership doctrine in Louisiana by saying that a separate estate should have been seen as created by the mineral reservation in the case and, at the same time, a praedial servitude as having been created upon the surface for the benefit of the new separate estate.

But this viewpoint was not in accord with what was already becoming a solidly established doctrine in Louisiana. The non-ownership theory has never been seriously challenged since the *De Moss* and *Calhoun* salients. It is true that in the 1942 case of *Coyle v. North American Oil Consolidated*,[15] the argument was attempted that separate

[13] Article 519, La. Civil Code of 1870, provides that: "Pigeons, bees or fish, which go from one pigeon house, hive or fish pond, into another pigeon house, hive or fish pond, belong to the owner of those things; Provided, such pigeons, bees or fish have not been attracted either by fraud or artifice."
[14] See Article 2450, La. Civil Code of 1870.
[15] 201 La. 99, 9 So. (2d) 473 (1942). See also Article 2, Proposed Louisiana Mineral Code, note infra.

strata of oil sands should be regarded as completely separate oil fields, however neither the proponent of this idea nor the court turned in the direction of the separate mineral estate. The court used the lease contract as the basis for finding that by the agreement the two strata involved could not be held as disconnected with respect to the production requirements of the lease. Impliedly, had the parties so arranged in the instrument disunity could have obtained, for the purpose of forcing the lessee to drill and produce from both strata of oil bearing sand.

It has also been attempted by litigants, in several instances, to assert that the mineral lease or deed granted a *corporeal* interest. The Supreme Court's rejection of this is in harmony with the basic theory of non-ownership. In *Gulf Refining Company of Louisiana v. Hayne, et al*,[16] when an oil lessee attempted to sue the lessor (and lessor's co-owners) for a partition in kind of the leased land, the court answered that only an owner could sue a co-owner for partition, and that the plaintiff-lessee was not an owner of a portion of the estate even though he did own a right permitting the exploration for and extraction of oil. The court stated that while it might recognize his rights resulting from the mineral lease, it could not place the plaintiff in actual corporeal possession of an undivided interest in the land. His right, it was stated, was only an abstract right and did not bear upon a specific property.

The court's refutation of corporeality was even more direct in *Wemple v. Nabors Oil & Gas Company*.[17] The

[16] 138 La. 555, 70 So. 509 (1916).
[17] 154 La. 483, 97 So. 666 (1923).

plaintiff complained of slander of his title by the defendants' asserting a claim to all the minerals underneath his land. He contended that the defendants' "mineral estate" was a servitude and incorporeal in nature, and that it consequently had prescribed through ten years non-use. The defendant argued that the oil and gas was a distinct property from the surface or the earth proper and thus was subject to separate ownership.

The court made specific reference to the *DeMoss* and *Calhoun* expressions in favor of the separate mineral estate, classifying them as "purely obiter" and stating that these cases comprise the only instances of such recognition. Louisiana's Civil law, it said, permits but two kinds of estates—the corporeal, which is ownership, and the incorporeal, which is servitude and usufruct. Attempts to add extraneous ideas of "land tenures" to these simple Civilian principles accordingly must be steadily repulsed. Consequently, the court held, this incorporeal interest of the defendant had terminated because of non-user.

b. The "non-ownership" concept.

The State of Oklahoma offers an example of the non-ownership doctrine in a common law jurisdiction. There, no matter how the granting clause is phrased, the lease grants an incorporeal hereditament.[18] This means that, while it is inheritable, it is only a right that is conveyed and not a corporeal estate. The conclusion is the same even when the instrument is so worded as to purport

[18] See leading Oklahoma case, Rich v. Doneghey, 177 Pac. 86.

to grant ownership of the minerals, for the reason that the landowner is seen as having none to pass on. This "exclusive right" is more than the personal right which the Louisiana mineral lease seems to grant,[19] in that it is an interest in the land. Since it is such an interest and for a period of years, the right is often termed a "chattel real." Named from the point of view of its nature, the right is usually called a "profit a prendre"—that is to say, "a right to take from another's land a part of the soil or of the products of the soil."[20]

The most often cited opinion for non-ownership has been that of the United States Supreme Court in *Ohio Oil Company v. Indiana.*[21] An Indiana statute had made it a penal offense for the possessor of an oil well or a gas well to permit any of the gas or oil to escape following a certain period after bringing the well in. In determining the constitutionality of the law the court found the question to hinge upon whether or not the minerals could be owned by a person while they were still in the earth. If they could not be so owned and if physical possession were a prerequisite to the responsibility contemplated by the statute then such state control could be refuted as to oil and gas not yet reduced to possession. The court held that while the petroleum was at large underground it could not "belong to someone in particular to the exclusion of all other persons." It described oil and gas as being quite different from other minerals beneath the earth: "They have no fixed situs under a particular portion of the earth's surface within the area where they obtain.

[19] Under the holding in Gulf v. Glassell, note infra.
[20] Tiffany, Real Property (1940), p. 574, 577.
[21] 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729 (1900).

They have the power, as it were, of self-transmission."

In Louisiana the 1916 case of *Hanby v. Texas*[22] caused the Louisiana court to analyze the character of mineral rights, with interesting dicta resulting. The *sale* of an interest in minerals, it was stated, does not convey any title in them. It does, however, convey the right to use the surface of the property, the court continued, so that the minerals might be reduced to possession. But no other right could be conveyed, for this was the only one concerning "those fugitive products" that the landowner himself had.

This was the same conclusion with respect to mineral interests that Oklahoma has reached. However, it does not necessarily follow from this that the lease proper is here held in the same regard as the Oklahoma lease, because in Louisiana the lease right is not identical with the mineral interest granted by deed.

The foundation case for non-ownership in Louisiana is *Frost-Johnson Lumber Company v. Salling's Heirs.*[23] Here the court said that it was not an abstract proposition of law but a fact that oil and gas are naturally incapable of being absolutely owned. Article 488 of the Civil Code was cited to the effect that ownership is the right by which a thing belongs to someone in particular, to the exclusion of all other persons. So also was cited Article 494, providing: it is of the essence of the right of ownership that it cannot exist in two persons for the whole of the same thing; but they may be the owners of the same

[22] 140 La. 189, 72 So. 933 (1916).
[23] 150 La. 756, 91 So. 207 (1920, reh. 1921, second reh. 1222).

thing in common, and each for the part which he may have therein.

Reference was made at some length to *Ohio Oil Company v. Indiana*,[24] it being pointed out that the test used by the United States Supreme Court was substantially the same as is set forth in Article 488. The court felt able to say that the Louisiana decisions in support of non-ownership were "in accord with the general law" that the "fugitive" minerals could not be privately owned, as ownership was defined in the Civil Code.

As for the *De Moss v. Sample* and *Calhoun v. Ardis* decisions, the court described the expressions in favor of ownership as "rather loose" and said that the question of ownership of oil and gas unreduced to possession was not an issue in either case. The question in these cases, it was stated, was only whether a grantor of land could successfully reserve mineral rights to himself and not whether he could reserve full ownership of the minerals. The conclusion was that there was nothing in either decision to conflict with the rule of non-ownership in Louisiana.

A subsequent attempt to discredit this holding was not successful. In the case of *Wetherbee v. Railroad Lands Company, Limited*,[25] it was urged that the conclusion of the *Salling's Heirs* case be reconsidered and reversed for the reason that it had become known through experience that oil and gas cannot move beneath the earth as had been thought earlier. It was now understood, the defendants in the case contended, that these minerals were

[24] Supra note 21.
[25] 153 La. 1059, 97 So. 40 (1923).

generally trapped in certain rock formations or confined within unmoving sands. The court replied to this by pointing out that it was nonetheless still possible for a person to drain oil and gas from beneath other lands, and that consequently the newly found knowledge simply modified in degree the theoretical foundation for non-ownership but did not invalidate it.

The matter of whether or not minerals may be separately owned under the law of a particular jurisdiction is hardly critical so far as the actual removal of petroleum is concerned. In either event the operator may explore, drill, and produce, and the landowner will receive his corresponding consideration. However, the theoretical conclusion reached by a jurisdiction is not, on the other hand inconsequential, and in Louisiana the consequence of "non-ownership"—the basic justification for which seems to be that there can be no estates in land other than full ownership or servitude[26]—is that the right acquired by the operator must be, under present available categories, either a servitude or a personal right, but nothing more.

[26] The analogy to animals "ferae naturae" as a justification for non-ownership has become discredited in Louisiana. See Frost-Johnson Lumber Company v. Salling's Heirs, supra note 23. This concept made an early appearance in mineral law in Pennsylvania. See Westmoreland and Cambria Gas Co. v. De Witt, 130 Pa. 235 (1889). However, it is now somewhat discredited in common law states as well as in Louisiana. See Ohio Oil Company v. Indiana, note 21 supra.

II. CLASSIFICATION OF THE MINERAL LEASE IN LOUISIANA.

a. Some general considerations.

The question of whether the leasing of minerals is a sale was the subject of more concern in the early cases seeking to find the identity of the instrument than it has been in the later ones. The provoking factor in this connection is the right of the mineral lessee to consume the minerals to the point of exhaustion. On the other hand, because of the doctrine of non-ownership, the minerals cannot themselves be the object of a change of ownership while still unremoved from their subterranean lodging.

Sale is identified by its placement in the Civil Code as one of the "different modes of acquiring the ownership of things."[27] That these "things" need not be corporeal but may consist of rights follows from the presence of Lease in the same book of the Code, and specific authority that an abstract right may be the subject of a sale is set forth in Article 2449.[28]

Granting that the thing sold must be the "right" to search for and obtain oil and gas, what is the price of the sale in the case of the mineral lease? In a sale the price must be certain, states Article 2464.[29] If it be the rent and bonus only, then might not the price be vile—in

[27] Title VII of Book III, Louisiana Civil Code of 1870.
[28] Article 2449 of the Code states that: "Not only corporeal objects, such as movables and immovables, live stock and produce may be sold, but also incorporeal things, such as a debt, an inheritance, the rights, titles and interests to an inheritance or to any parts thereof, a servitude or any other rights."
[29] Louisiana Civil Code of 1870.

terms of objective value at the time of the sale? Or is this possibility avoided by classification under Article 2451[30]—as the sale of a "hope"?[31] For under the classification as an aleatory sale the disparity between the price and the value of the thing is not important. Or does the price extend to include the promised royalty in the event of production?[32]

Whether or not the mineral lease is a sale is a question of practical interest because an unqualifiedly affirmative conclusion would throw the transaction open to the regulations in the Sales portion of the Code. For example, under that classification the vendor (the mineral lessor) might avail himself of the concept of lesion beyond moiety,[33] grants a warranty against eviction to the vendee,[34] and has ambiguities in the agreement construed against him;[35] while the potential vendee would receive the right to specific enforcement of a promise to lease.[36] However, the jurisprudence has not given a blanket identification as a sale to the transaction but has indicated that certain features of it will fall within the Sales provisions of the Code while certain others will not.

[30] Article 2451 states that: "It happens sometimes that an uncertain hope is sold; as the fisher sells a haul of his net before he throws it; and, although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught."
[31] See Losecco v. Gregory, 108 La. 648, 32 So. 985 (1901), and Harrell v. Imperial Oil & Gas Products Co., 171 La. 891, 132 So. 413 (1931).
[32] See cases cited infra note 44. But see also Gulf Refining Company v. Garrett, cited in note 45 infra.
[33] Article 1861, Louisiana Civil Code of 1870.
[34] Article 2476, Louisiana Civil Code of 1870.
[35] Article 2474, Louisiana Civil Code of 1870.
[36] Article 2462, Louisiana Civil Code of 1870.

The cases are consistent in their attitude toward the applicability of lesion beyond moiety.[37] In *Lieber v. Ouachita Natural Gas and Oil Company*[38] the instrument was one which purported to convey the oil and gas in a certain tract. The grantor sought relief from the agreement contending, among other things, that the price was vile and that there should be annulment for lesion beyond moiety. The court responded that this was not properly a contract of sale and that, consequently, there could be no lesion assessed against it. *Fomby v. Columbia County Development*[39] specifically concerned mineral leases, the court announcing that such instruments were not contracts which could be annulled for lesion. Other decisions have reinforced this conclusion.[40]

A different position has been taken in the case of warranty. In the 1933 case of *Slack et al v. Riggs et al*[41] the landowner and his lessees brought suit against Riggs claiming that he was trespassing by drilling on the plaintiffs' land. Riggs called in warranty as his lessors the Louisiana and Arkansas Railway Company and the Bodcaw Lumber Company of Louisiana, asking judgment against them for costs and expenses up to the date of the granting of the preliminary judgment against him. After pointing out that the lessors were obliged, through their express warranty of title, to protect their lessee's pos-

[37] See note 33 supra.
[38] 153 La. 160, 95 So. 538 (1922).
[39] 155 La. 705, 99 So. 537 (1924).
[40] Nabors Oil & Gas Company v. Louisiana Oil Refining Company, 155 La. 361, 91 So. 765 (1922); Vandersluys v. Finfrock, 158 La. 175, 103 So. 730 (1925); Wilkins v. Nelson, 161 La. 437, 108 So. 875 (1926); Harrell v. Imperial Oil & Gas Products Company, 171 La. 891, 132 So. 413 (1931).
[41] 177 La. 222, 148 So. 32 (1933).

session of the leased tract, the court said that even without such express warranty the lessors had the duty to prevent the lessee's eviction. Article 2501 in the Sales section of the Code was used as authority for this.

In *Cochran v. Gulf Refining Company*[42] the court identified the mineral lease as being more the sale of a real right than an ordinary lease contemplating occupancy of a house or land. And in *Wiley v. Davis*[43] it stated that the granting of a mineral lease on property constituted a dismemberment of the property amounting to a partial alienation of it.

On the other hand a number of cases[44] have stated that in the oil and gas lease the payment of royalty is the payment of rent and not the payment of price for oil. However, in *Gulf Refining Company v. Garrett*[45] Chief Justice O'Niell, referring to these cases, said:

> Notwithstanding the royalty stipulated in an oil and gas lease may be considered as rent for certain purposes, or in some aspects, it is well settled now that the royalty stipulated in an oil or gas lease is not to be compared with the rent of a house or farm.

General statements by the court, as to whether the lease is a sale or not, can be found pointing in either direction. In *Spence v. Lucas*[46] the court stated that mineral leases would be construed as leases and not as sales. Later, in

42 139 La. 1010, 72 So. 718 (1916).
43 164 La. 1090, 115 So. 280 (1927).
44 Board of Commissioners of Caddo Levee District v. Pure Oil Company, 167 La. 801, 120 So. 373; Logan v. State Gravel Company, 158 La. 105, 103 So. 526; Roberson v. Pioneer Gas Company, 173 La. 313, 137 So. 46 (1931).
45 209 La. 674, 25 So. (2d) 329 (1945).
46 138 La. 763, 70 So. 796 (1915).

Nabors Oil and Gas Refining Company v. Louisiana Oil Refining Company,[47] we find the court holding that:

> The doctrine that an ordinary lessee cannot dispute the title of his lessor during the time of the lease has no application to a contract in the form of an oil and gas lease by which a person acquires mineral rights, it being more like a sale than an ordinary lease.

In the comparatively early case of *Rives v. Gulf Refining Company of Louisiana*[48] the court held that the ordinary rules of lease could not apply where minerals were involved. It made reference to the case of *R. F. Wadkins v. Atlanta,*[49] in which it had denominated the mineral interests as a real right. Oil and gas, said the court, is as much a part of the realty as coal or stone, and the surface owner owns them until they escape from beneath his land. However, it pointed out, the minerals cannot be owned separately from the soil. This opinion would place the mineral lease in between its present extreme positions in Texas and Louisiana jurisprudence, for it describes the instrument as granting less than a corporeal estate but more than a mere personal right.

The language of Sommerville, J., in delineating the instrument is worth repeating:

> Gas and oil leases and contracts are a part by themselves. There is scarcely any comparison between them and the ordinary farm or house lease,

47 151 La. 361, 91 So. 765 (1922).
48 133 La. 178, 62 So. 623 (1913).
49 This case unreported. See appendix of Dimick's "Louisiana Law of Oil and Gas", F. F. Hansell & Bro., New Orleans, 1922, for report.

> although there is some resemblance in them to coal or solid mineral leases. The Code is silent as to such contracts for the reason doubtless, that minerals were not in the contemplation of the lawmakers at the time that the Code was adopted. The legislature up to this time has been silent upon the subject of mineral rights and contracts. Such contracts partake of the nature of both sale and lease, and they have features which are not applicable to either.

In *Cooke v. Gulf Refining Company of Louisiana*[50] the court reiterated the words of the *Rives* case and said that the law with reference to sales and leases in the Civil Code cannot always be applied to oil leases.

A mineral lease was the object of concern in *Powell v. Rapides Parish Police Jury*,[51] although the product to be removed was gravel. The court rejected the plaintiff's contention that the defendant could not dispute the title of his lessor, stating that such doctrine did not apply to a mineral lease which was to that extent more like a sale than an ordinary lease. This kind of conclusion is hard to criticize insofar as it recognizes that the doctrine of lease contracts here sought to be interposed was not created in contemplation of contracts for the discovery and removal of minerals.

It is apparent that, so long as one speaks in generalities of the "sale" classification of mineral leases, one cannot place them completely in or completely out of that category. However, when specific instances are considered the jurisprudence is not quite as equivocal as might seem. In this connection, the Circuit Court of Appeals for the Fifth Circuit, said in *Commissioner of Internal Revenue v. Gray*:[52]

> This concept of an oil and gas lease partaking of the nature of both sale and lease, runs through the jurisprudence of Louisiana. . .and the law applied in a given case has depended on whether the articles of the Code dealing with letting and hiring were applicable to the issue before the court, or whether a partial alienation or dismemberment of the fee, the sale feature of the lease contract, was a factor to be considered by the court in passing on the question before it. Most of the apparent conflicts in the cases can be reconciled if this differentiation be observed.

Another problem of classification has been whether or not the right granted by the mineral lease was real. In the *Wadkins* and *Rives* cases, referred to above, the conclusion was affirmative. And in *Nobel v. Plouf*[53] the court refused to admit parol evidence to the effect that the plaintiffs' grantors had authority to grant the oil lease involved, on the ground that the rights created by the mineral lease were immovables. In the case of *American National Bank v. Reclamation Oil Producing Association of Louisiana*[54] the problem was to determine whether or not the defendant association—organized to buy and sell oil leases and wells, and to reclaim abandoned wells—was an ordinary or a commercial partnership, inasmuch as in the latter case each individual member

[50] 127 La. 592, 53 So. 874 (1911).
[51] 165 La. 490, 115 So. 667 (1928).
[52] 159 F(2d) 834, (CCA, 5th Circuit, 1947).
[53] 154 La. 429, 97 So. 599 (1923).
[54] 156 La. 652, 101 So. 10 (1924).

would have been liable in solido for an indebtedness of the association to the plaintiff.[55] The court, pointing out that commercial partnerships are those dealing with personal property,[56] stated that the organization's purpose of purchasing oil and gas leases, as well as abandoned wells, served to indicate that it was not a commercial partnership for the reason that oil leases and oil wells constituted real estate.

However, in spite of the firm attitude taken by the court in these earlier cases as to the real nature of mineral leases, the judiciary had by 1936 come to an equally firm conclusion, as enunciated in the *Glassell* case,[57] that the right granted by the instrument was no more than personal, a viewpoint which it found occasion to reaffirm[58] even after specific legislation had, in 1938, announced that oil and gas leases were "hereby defined and classified as real rights and incorporeal immovable property. . ."[59]

In 1936 there was initiated a project which contemplated, among other things, establishment of the character of oil and gas leases. A commission was set up to propose a mineral code for adoption by the legislature.[60]

[55] Article 2872, Louisiana Civil Code of 1870, states that ". . .Commercial partners are bound in solido for the debts of the partnership."
[56] Article 2825, Louisiana Civil Code of 1870.
[57] Gulf v. Glassell, 180 La. 190, 171 So. 846 (1936).
[58] Sabine Lumber Company v. Broderick & Calvert, 88 F(2d) 586 (1937), (CCA, Fifth Circuit); Posey v. Fargo et al, 187 La. 122, 174 So. 175, (1937); Marchand v. Gulf Refining Company of Louisiana et al, 187 La. 1002, 175 So. 647 (1937); State ex rel Muslow v. Louisiana Oil Refining Corporation, 176 So. 686 (1937).
[59] Louisiana Act 205 of 1938.
[60] Act 170 of 1936. See 12 Tulane L. Rev. 552, Symposium on the Proposed Louisiana Mineral Code.

The aim of this codification program was clarification of the mineral law by a declaration of general principles to govern the relations of the landowner, the oil operator and the holder of a mineral interest. The commission took the position that the mineral lessee's right was not basically different from that of the mineral purchaser, the only difference being that the right stemming from the mineral "sale" was received unburdened by the rental payments, the development condition, and the other sustaining terms of the lease contract. The effect of this difference in the proposed code was that the unburdened right was to be regarded as perfect ownership of the mineral right while the lease granted imperfect ownership of the same.[61] In each case, the right was to be clearly a real one.[62] Besides integrating the described interests into the Civil Code's pattern of perfect and imperfect ownership, the projected code expressly announced that the public policy of this state recognized no other tenures in land beyond this basic civilian arrangement.[63] The imperfect ownership of the right, it was provided, would not prevent its owner from exercising all the rights which would have been given by a perfect ownership, except to the extent that this exercise must give way to the "obligations and conditions, express and implied, in his title to such right."[64]

[61] Article 5, Proposed Louisiana Mineral Code (2d Revised Draft, 1938).
[62] Article 3, Proposed Louisiana Mineral Code (2d Revised Draft, 1938).
[63] Article 7, Proposed Louisiana Mineral Code (2d Revised Draft, 1938).
[64] Article 5, Proposed Louisiana Mineral Code (2nd Revised Draft, 1938).

The mineral lease itself was described in the mineral code as of the nature of both sale and lease,[65] and it was to be considered as an incorporeal immovable.[66] There was to be no "estoppel" of the lessee's right to question the lessor's title, providing the latter was promptly notified,[67] and where the lessee found his lessor's title to be substantially defective he was permitted to acquire the outstanding interest from another.[68]

As for prescription, provision was made that immovables would be liberated from "every species of real right to which they may be subject" in the event of ten years continuous non-user.[69] The language leaves no doubt as to its applicability to the mineral lease as well as to the mineral sale. This would have completed the statutory recognition of the lease as occupying the legal status of servitude, which category a number of the judiciary's opinions had previously found the lease to fit.[70]

But the legislature never invested this proposed code with the sanction of law, nor has any subsequent project been authorized to clarify and standardize the law regulating what has become a leading industry in this State. In fact, with but a few exceptions, the legislature's in-

[65] Article 35, Proposed Louisiana Mineral Code (2nd Revised Draft, 1938).
[66] Article 36, Proposed Louisiana Mineral Code (2nd Revised Draft, 1938).
[67] Article 112, Proposed Louisiana Mineral Code (2nd Revised Draft, 1938).
[68] Article 111, Proposed Louisiana Mineral Code (2nd Revised Draft, 1938).
[69] Article 177, Proposed Louisiana Mineral Code (2nd Revised Draft, 1938).
[70] Frost-Johnson Lumber Company v. Salling's Heirs, infra note 89; Arent v. Hunter, 171 La. 1059, 133 So. 157 (1931).

activity with reference to the rights affected by the removal of petroleum from privately owned land has been marked. The Supreme Court has stated in some opinions that this inertia calls for viewing the mineral lease as an ordinary Civil law lease, as of a house or farm, but when the court has earlier classified the instrument as otherwise than an ordinary lease the lawmaking body has remained equally passive, so its tacit approval appears too easily won to be properly determinative. The "ordinary lease" view apparently gives too much emphasis to the title of the instrument, but this is a borrowed name—and borrowed from the common law mineral instrument at that,[71] and it is questionable whether this should be given so much weight as the basis for placement of the transaction within our Civilian framework of law.

The judiciary, on the other hand, has of course been unable to avoid expressions, in response to litigation over property rights, which in one way or another have classified the mineral lease. If the picture presented by the totality of these decisions is a kaleidoscopic one, then all the more necessity is there for the legislature to meet the problem with a complete response. When Louisiana's present legal system was initiated stare decisis was purposefully denied a role,[72] but by way of propinquity

[71] Many common law states preceded Louisiana in the discovery of petroleum in commercial quantities. The instrument introduced in this state to be used for the transaction between the operator and the landowner, appears, accordingly, to have been called a "lease" solely for the reason that such was its designation in the industry throughout the other states.
[72] See Comment, Stare Decisis in Louisiana, 7 Tulane L. Rev. 100 (1932).

and otherwise it has come to play a strong part in our legal system. And with the attendant emphasis upon judicial holdings, the expressions of the Supreme Court have acquired more significance than they otherwise would have had. The following sections approach the classification of the mineral lease as a servitude and as an ordinary Civil law lease with these expressions as the basis.

b. The mineral lease as a servitude.

Book II of the Louisiana Civil Code lays down two modifications of ownership: firstly, the personal servitudes of usufruct, use and habitation, and secondly, praedial servitudes. The essential characteristics of these thoroughly Roman categories are that the personal servitude affixes to an individual and the praedial servitude attaches to a tract of land.[73]

Are these divisions exclusive for limited ownership, or may the parties further divide the elements of ownership by convention?[74] This is one of the questions which arises if a mineral lease be labeled a servitude. If the answer is that the codal divisions are exclusive, then additional questions arise. Can a mineral lease—or any mineral right, for that matter—be a praedial

[73] See Article 533, and Article 646, Louisiana Civil Code of 1870.

[74] These divisions in the Louisiana Civil Code are unchanged from the Roman law in its developed state. With reference to the development of servitudes in that earlier law Radin says, in Radin on Roman Law, page 371, (West Publishing Company, 1927), that at first it was theoretically possible for any type of servitude to be created but that in time the definite groups of rights which had come into being had hardened.

servitude when it does not attach to another tract of land?[75] Can it be a personal servitude when the right does not expire with the person in whose favor it exists?[76]

Rights which are somewhat analogous to the right to seek and drill for oil on another person's land are to be found under the headings of praedial and personal servitudes in the Institutes of Justinian and, closely patterned thereafter, in the Louisiana Civil Code. At Roman law the products of mines (provided that they were already open) were among those to which a usufructuary was entitled.[77] The Louisiana Civil Code contains the same provision.[78] Among the variety of praedial servitudes which had developed in the Roman law were the right of quarrying stone or chalk,[79] the right of digging sand,[80] and the right of drawing water on another's land[81] (as distinguished from the right of conducting water, another Roman servitude). These same rights are also described in the Louisiana Civil Code, with the right of quarrying classified as a usufruct,[82] and the right

[75] Article 646, Louisiana Civil Code of 1870, states that: ". . .They are called *praedial or landed servitudes,* because, being established for the benefit of an estate, they are rather due to the estate than to the owner personally. . ."

[76] Article 606, Louisiana Civil Code of 1870 states that: "The right of the usufruct expires at the death of the usufructuary."

[77] See Radin on Roman Law, Page 381, (West Publishing Company, 1927).

[78] Article 552, Louisiana Civil Code of 1870.

[79] See Radin on Roman Law, page 373, (West Publishing Company, 1927).

[80] Institutes of Justinian, 2, 3, para. 2. See Sherman: Epitome of Roman Law, page 49, 1937.

[81] See Rudolph Sohm: The Institutes, page 362 (2nd Edition, Oxford at The Clarendon Press, 1901). See also Thomas Cooper: The Institutes of Justinian, page 470, section 468 (John Voorhies Law Bookseller and Publisher, New York, 1852).

[82] Article 552, Louisiana Civil Code of 1870.

of digging sand and drawing water classified as praedial servitudes.[83]

This group of rights originating as Roman rustic servitudes will be recognized as being very similar in nature to the "profits"[84] of the common law. However, there is a distinct difference, and one which creates a difficulty for the viewing of oil and gas rights as being praedial servitudes: where the common law "profit" exists for the benefit of a particular person, the Louisiana praedial servitude exists, as did its Roman ancestors, for the benefit of a particular estate. A further distinction lies in the fact that the right to a servitude may be extinguished by non-usage,[85] the result of which, in oil and gas, is to provide a limit beyond which a mineral right may not be withheld without exploitation or attempted exploitation.[86] A similarity between the servitude and the profit occurs in the possibility of extinguishment by confusion,[87] an idea which has been introduced in litigation with reference to the Louisiana oil and gas lease.[88]

[83] Articles 721 and 723, Louisiana Civil Code of 1870.
[84] See text supra, and note 20 supra.
[85] Article 789, Louisiana Civil Code of 1870 states: "A right to servitude is extinguished by the non-usage of the same during ten years." A similar provision exists for usufruct in Article 618 of the Code where it is stated: "The usufruct may be forfeited likewise by the non-usage of this right by the usufructuary or by any person in his name, during ten years, whether the usufruct be constituted on an entire estate, or only on a divided or undivided part of an estate."
[86] This is, of course, a very desirable thing since it keeps the potential oil reservoir open to commerce. As a practical matter, however, lease contracts are not drawn up for more than ten years in the absence of development.
[87] Article 805, Louisiana Civil Code of 1870.
[88] Scott v. Magnolia, note 102 infra.

A consideration of the nature of the mineral lease should, it would seem, include an examination of the decisions in which the Louisiana judiciary for well over a decade indicated that it did not question that such instrument created a servitude. However, because the mineral lease is not so viewed today, brevity will be sought for in considering the following decisions.

In 1922 the Supreme Court issued its opinion in the *Frost-Johnson Lumber Company v. Salling's Heirs* case,[89] which is usually cited as the foundation for the application of the servitude concept to mineral rights. The case concerned the sale and reservation rather than the leasing of minerals, but from this point onward a right granted by such a sale or reservation was firmly cemented in the jurisprudence as a servitude. The inclusion of the right granted by the mineral lease within this same category was imminent, although its lodging there was to prove much less secure.

The 1924 decision of *Exchange National Bank v. Head*,[90] found the Supreme Court rejecting an exception which presupposed the separate ownership of oil and gas below the surface, by replying that all that was conveyed by the mineral lease in the case was a right of servitude. The following year, in *Vander Sluys v. Finfrock*,[91] the court held that a real estate broker's commission was not due in the granting of a mineral lease because such a transaction involved not real estate but only a "real right or servitude."

[89] 150 La. 756, 91 So. 207 (1922).
[90] 155 La. 309, 99 So. 272 (1924).
[91] 158 La. 175, 103 So. 730 (1925).

In 1930, in the case of *Castille v. Texas Company,*[92] the plaintiffs sought to have mineral leases canceled for ten years non-user as well as for non-development. The court found that the plaintiffs' petition disclosed no right or cause of action for the reason that there had actually been some production on the leases and so, in the court's words, "the servitudes were used during the prescriptive period." In *Federal Land Bank v. Mulhern*[93]—a 1934 case—the defendants had given mineral leases on land which they had mortgaged and the natural gas beneath was being removed by the lessees. The court said that such leases were in the nature of servitudes and employed Article 750[94]—which provides that the creditor has the right to demand his debt if it is evident that the estate's value is being depreciated from the establishment of a servitude—to permit the plaintiff to collect on the notes before maturity.

The final expression of the judiciary to the effect that the instrument grants a servitude was its most unequivocal. In 1936, in *State ex rel. Bush et al v. United Gas Public Service Company et al,*[95] the court employed Article 741[96]—providing that when partition between coowners of land is effected by licitation and the property is adjudicated to a third person, the servitude automatically goes out of existence—to permit cancellation of the mineral lease in the case. The court said:

> The fact that an oil and gas lease is one of servitude is no longer a debatable question in this State. The

92 170 La. 887, 129 So. 518 (1930).
93 180 La. 627, 157 So. 370 (1934).
94 Louisiana Civil Code of 1870.
95 185 La. 496, 169 So. 523 (1936).
96 Louisiana Civil Code of 1870.

> court has repeatedly held that such a lease merely clothes the lessee with the right to extract oil and gas that may be beneath the land.

The decision was a unanimous one. Yet but four months later, in the *Glassell* case,[97] the court had completely shifted over to employment of another division of the property system in the Civil Code, a position to which it has since firmly adhered, with reference to the lease. The fact that its enunciations in support of the label of servitude were largely obiter dicta did not serve to lessen the surprise occasioned by this change.

Several decisions which occurred subsequent to the court's departure from the servitude viewpoint raise interesting questions with regard to any future return to that classification. In *Levy v. Crawford, Jenkins and Booth*[98]—a 1940 case—the position was taken by the plaintiffs that division of the lease by the lessee (in the form of an assignment of the center portion of the lease to another oil company) had the effect of dividing the servitude. However, the court held contrariwise, stating that drilling in the center portion comprised user for the entire tract, on the ground that the original servitude, created by a mineral reservation, was still on one contiguous tract.[99] This conclusion keeps the mineral lease and the mineral right arising from sale or reservation estranged so that they may be dealt with independently, and in that respect is consistent with the court's outlook

97 See note 120 infra.
98 194 La. 757, 194 So. 772 (1940).
99 Thus not subject to the principle set out in Lee v. Giaque, 154 La. 491, 97 So. 669 (1923), that when tracts are noncontiguous, maintenance of the servitude by user on one does not maintain the servitude on the unused one.

following 1936. Later, in *Dobbins v. Hodges,*[100] the conclusion of the indivisibility of a mineral lease was again reached, although purely on the basis of the contract involved.

The question of the applicability of the concept of "confusion" — a mode of extinguishment of a servitude occurring when the estate to which it is due and the estate owing it are united in the same hands[101] — to the mineral lease, was introduced in *Scott v. Magnolia*[102] in 1942. The argument was there attempted that when a party acquired both a mineral lease on and a mineral interest in the same property, the lease became "merged" with the mineral interest and was consequently extinguished. The court failed to pass upon this point, deciding that because the plaintiff purchased the mineral interest subject to the lease, he waived any right to invoke the idea of confusion. Even had the court considered the question, it might well have found that all the necessary components for confusion were not present inasmuch as the party concerned did not have the land itself against which the two rights were directed. However, the case indicates the possible application of the merger theory to a lease and offers a warning against the situation in which the mineral owner acquires the lease, even if but for a fleeting period.

The classification of the Louisiana mineral lease as something in the nature of a servitude cannot be completely dispensed with owing to the possible effect upon

100 208 La. 143, 23 So. (2d) 26 (1945).
101 Article 805, Louisiana Civil Code of 1870.
102 200 La. 401, 8 So. (2d) 69 (1942).

the lease of Act 205 of 1938[103] as subsequently amended. This Act, as pointed out earlier herein, defined oil and gas leases as "real rights and incorporeal immovable property" and, while it has been held to be merely procedural,[104] later legislative reinforcement indicates that this definition goes to the very nature of these leases. Save for the continued reluctance of the Supreme Court, little remains now to prevent these instruments from being regarded as granting a form of servitude. While conceding that a mineral lease places no obligations on the land itself and that such classification is not entirely free of problems, it is difficult to imagine where else in the present structure of the Civil Code such a right — less than full ownership, but yet a *real* right — might fit as harmoniously.

c. The mineral lease as an ordinary Civilian lease.

At Roman law no interest in the land went to the lessee, unlike the situation at common law wherein the lessee received an estate for years.[105] The Roman lease was nothing more than a personal contract, breach of which by the landlord left but a right of damages in the lessee.[106] Where the common law lessor sold the land subsequent to the lease the lessee still retained his interest, while the Roman lessee in this position found his lease ampu-

103 See note 129 infra, Amended in 1950—see note 146 infra.
104 Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336 (1940).
105 Radin on Roman Law, p. 238, (West Publishing Co. 1927); Tiffany, Real Property, p. 61 (Callaghan & Company, Chicago, 1940).
106 Radin, Handbook of Roman Law, p. 238 (1927); Buckland, A Manual of Roman Law, p. 290.

tated by such a transfer of title.[107] The "lease" in the Louisiana Civil Code maintains these racial characteristics of its Roman ancestor which fundamentally distinguish it from the transaction of the same name existing in the common law States of this country.

It was the holding of *Gulf v. Glassell*[108] that such a comparatively casual relationship was all that was created by an oil and gas lease in Louisiana. Yet it seems safe to say that the Louisiana oil operators and landowners, when entering into leases with each other, did not have in mind a relationship so foreign to that contemplated by the corresponding oil operators and landowners of Oklahoma or Texas or California. Certainly no inference that the arrangement created between them was but a personal contract could have been discovered in the content of the lease instruments wherein they expressed their mutual will. Nevertheless it was the court's considered conclusion that when the Louisiana landowner granted to the *X* Oil Corporation, for a period of years, access to and right of way over his land, the right to search for oil and to conduct various geophysical tests in implementation of that search, the right to drill wherever it might desire upon the land, and the right to remove *as owner* a very substantial portion of the oil found—that when such a relationship was set up it involved no more extensive problems of possession or ownership than

[107] The ejected common law lessee had a right, as against the world, to recover the land. This became the basis for the action of Ejectment. Tiffany, Real Property, p. 63 (Callaghan and Company, Chicago, 1940); with reference to the Roman lessee, see note 106 supra.

[108] See note 120 infra.

existed in a contract to rent a barn or to raise crops on another's land.

The matter of "possession," brought into focus in the *Glassell* case, is the essence of the difference between the lease of English origin employed in the other States and the Civilian transaction existing in Louisiana: the common law lessee *possessed* the leased property while his Roman counterpart did not. The cause of this far-reaching variation was the Roman criterion—carried on in Louisiana[109]—for the state of mind required to constitute possession. It was necessary that one have *animus domini*—the intent to possess as owner.[110] Thus, to say that the *X* Oil Corporation held but a traditional, ordinary Civil law lease[111] upon a certain tract was to say that he held but a personal right and *possessed* nothing at all, a conclusion which substantially narrowed the rights available to this oil operator for protecting himself and his costly venture.

The mineral lease had been treated as a contract of letting prior to 1936, but these decisions were so scattered in time and so tangential and indirect, so far as any consideration of the nature of the mineral lease was concerned, that it is understandable why the *Glassell* case appeared as the fountainhead. There had been, to begin with, the early cases previously indicated which saw in the mineral contract elements of both sale and lease.[112]

[109] Article 3436, Louisiana Civil Code of 1870, provides: "To be able to acquire possession of property, two distinct things are requisite: 1. The intention of possessing as owner. 2. The corporeal possession of the thing."

[110] Buckland and McNair, Roman Law and Private Law (1936), pp. 65, 66.

[111] The *Glassell* holding, infra note 120.

[112] See notes 47, 48, 50, and 51 supra.

Then in 1915 the court handed down its opinion in *Spence v. Lucas*[113]—which has generally been cited as the first in the sparse line, if it may be called a line, handling the mineral transaction as a Civil law contract of letting.[114] Offering no support in reason for its position other than the perennial legislative inactivity in this field, it stated that "mineral leases will be construed as leases and not as sales." It cited the *Cooke v. Gulf* cases[115] (1911 and 1914) and *Rives v. Gulf* as authority without any mention of the emphatic pronouncement in the *Rives* case and the 1914 *Cooke* case that the ordinary rules of lease could not always be applied where minerals were involved. Thus, the *Rives* and the second *Cooke* decisions—whose essential attitudes really had been that oil and gas leases are unique and apart by themselves—in a sense were employed as the genesis for the present judicial viewpoint that such leases amount to ordinary contracts of letting as set out in Book III, Title IX of the Civil Code.

Ten years later the court, in deciding whether or not royalty paid a landowner for gravel mined from his land was "rent," used the *Lucas* case to decide in the affirmative.[116] This holding concerning royalty on gravel was then cited as the authority in several decisions in

[113] 138 La. 763, 70 So. 796 (1915).
[114] An earlier case, actually, was the 1911 Cooke v. Gulf case, however this opinion offered no attempt at analysis or providing authority. The court simply stated that the transaction appeared to be a lease and there ceased any consideration of its nature.
[115] 127 La. 592, 53 So. 874 (1911), and 135 La. 609, 65 So. 758 (1914).
[116] Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925).

1927[117] and 1931[118] applying lease articles from the Civil Code to the mineral contract. This was the sum and the substance of the jurisprudence prior to 1936[119] which might be regarded as pointing toward *Gulf v. Glassell.* However, even in the clear light of hindsight, it is difficult to ascribe much significance to these decisions. They occurred, for the most part, during the period when the mineral lease was being actually classified as a servitude by the Supreme Court, and since they are decisions wherein the fundamental nature of the mineral transaction was not under consideration but only treated by inference, they are better examples of judicial eclecticism than they are illuminations of Louisiana property law. The ultimate basis for such a "line" of decisions inferentially inconsistent with the categorical announcements of the the court in favor of the servitude identification, would seem to lie in the fact that while the word "lease" in Louisiana was something of a legal homonym—meaning one thing in the Louisiana Civil Code and quite a different thing in the oil industry—this was not always recognized by the court. Indeed, a reading of the group of cases just given gives the impression that any possible confusion as to the character of the mineral transaction had been dispensed with by the contractors' description of it, in each

[117] Board of Commissioners of Caddo Levee District v. Pure Oil Company, 167 La. 334, 113 So. 867 (1927). Another 1927 case employing the lease articles of the Code was Louisiana Oil Refining Corporation v. Cozart, 163 La. 90, 111 So. 610. This opinion conceded that the mineral lease was not an ordinary lease but said, without saying why, that such a lease was governed by the Codal provisions relative to leases.
[118] Roberson et al. v. Pioneer Gas Company, 173 La. 313, 137 So. 46 (1931).
[119] A 1936 decision in the line holding that royalty is rent, was Shell Petroleum Corporation v. Calcasieu Real Estate and Oil Co., 185 La. 751, 170 So. 785. This case cited Spence v. Lucas and the cases stemming from it as authority for the holding.

case, as a "lease," presumably a label scientifically precise and etymologically pure.

In 1936 came the Supreme Court decision of *Gulf Refining Company of Louisiana v. Glassell,*[120] a cause of immediate concern to the oil companies and of new confusion to members of the legal profession. While, as just indicated herein, there had been prior instances of the court's turning to the lease articles in the Code, this decision nevertheless overturned a considerable amount of jurisprudence upon which mineral lessess had come to rely in their transactions with landowners and they now found themselves in a highly unprotected position. In this case the lessee had brought a petitory action against alleged trespassers, claiming the exclusive right to possession of the land for the purpose of removing oil and gas deposits, the right to possession and ownership of the oil well drilled by the defendants, and all of the oil removed by the defendants from the property, as well as for an accounting of such oil sold. One of the grounds upon which the trial judge sustained the defendants' exception of no cause or right of action was that the lessee had no legal right to institute a petitory action since he did not have a real right in the realty.

The Supreme Court, upon appeal, affirmed this holding, saying that it had found "on several occasions" the usual oil and gas lease to be a contract of letting and hiring within the Codal provisions on leases. No reference was made to Article 2678[121] and its apparent exclusion from

[120] 180 La. 190, 171 So. 846 (1936).

[121] Article 2678, Louisiana Civil Code of 1870, provides: All corporeal things are susceptible of being let out, movable as well as immovable, excepting those which can not be used without being destroyed by that very use.

this category things destroyed in the using.[122] The oil and gas lessee, the decision announced, receives merely an obligatory or personal right but not a real right, and is consequently in the same position as an ordinary lessee of realty. It found its view to be "in accord with both the Roman and the Civil law."

In response to the citation by plaintiffs of the decisions indicating an owner of an oil and gas lease to have a real right, different from that of an ordinary lessee, the opinion said that so far as mineral *leases* were concerned these classifications were *obiter dicta* and unnecessary to the decisions.

The court discerned a number of similarities between the lease of a farm and the lease of minerals, justifying the same legal treatment for both: the oil and gas lessee receives the products from below the ground and the farm lessee harvests the crops from the surface; both get title to the products; neither claims ownership of the land; and each is entitled to the use and enjoyment of the property for the purpose for which it was leased. Such similarities do, indeed, exist. But they exist also in the case of a usufructuary,[123] which, according to the court's argument, would equally appear to justify treatment of the mineral lease as a servitude.

There was now a clear distinction as to character between the sale or reservation of the right to search and drill for minerals and the lease of this right: the

[122] This article was considered with reference to oil and gas leases in Logan v. State Gravel Co., supra, note 116. The court decided that Article 2678 concerned only the nature of a lease and not the essence, concluding that it did not apply to immovables.

[123] See Articles 544 and 545, Louisiana Civil Code of 1870.

lease granted only the right of use or enjoyment, a personal right, while the sale or reservation continued to create a servitude, a right in realty.

O'Niell dissented to the refusal of a rehearing in the *Glassell* case, arguing that while the court may have gone too far in some of its decisions in comparing a mineral lease with the sale or reservation of the mineral rights in a tract of land, it had not gone too far in prior cases in distinguishing between a mining lease and a house or farm lease. And the rule of property established in this distinction, he contended, should be adhered to.

However, the decision stood, and the classification of the transaction between the mineral lessor and lessee and the remedies available to the latter were now distinctly unfavorable from the point of view of the oil industry. In marked contrast to this, the Louisiana situation, most of the other oil producing States had available —because of the superior position of the lessee in the common law property scheme—three remedies for the lessee who might find himself confronted with the facts of the *Glassell* case: the action of ejectment, the right to injunction, and damages for trespass.[124] The fact that there still remained in Louisiana the possibility of obtaining damages from the lessor was hardly likely to be a satisfactory source of restitution because of the difficulty of computing the damages and then of obtaining them from landowners whose ability to compensate for the loss might be limited.

[124] See Comment, 11 Tulane L. Rev. 607 (1937).

And so, but a few months after the court had stated firmly that there was no longer any question concerning the servitude nature of the mineral lease, the court itself had questioned it to the extent of indicating that it no longer regarded the contract as a servitude. The court, it must be noted, did hold that the scope of the *Glassell* case was limited and that it held only that a mineral lessee could not bring a petitory or possessory action in his own name;[125] however a number of its other decisions indicate that the judiciary had departed indeed from its position that the mineral lease was a form of servitude.[126]

A consequence of removal of the mineral lease from servitude classification is the possibility that the liberative prescription has ceased to be applicable. This consequence is of little practical significance at the present time because the customary limitation of the term of such contracts to ten years has been maintained. Nevertheless, provisions as to term appeared to be more completely in the area of freedom of contract now than they had been previously.[127] It cannot be said with certainty, of course, that this apparent freedom as to the length of the term of the lease may not be yet inhibited by some judicial conception of land policy reflecting the ten year pre-

[125] Smith v. Kennon, 188 La. 101, 175 So. 763 (1937).
[126] Posey v. Fargo, 170 So. 512 (La. App. 1936); Marchand v. Gulf Refining Corp., 176 So. 686 (La. App. 1937); State ex rel Muslow v. La. Oil Refining Corp., 176 So. 686 (La. App. 1937); Hatch v. Morgan, 12 So. (2d) 476 (La. App. 1942); Tyson v. Spearman, 190 La. 871, 183 So. 201 (1938).
[127] Subject, of course, to the requirement of Article 2674, Louisiana Civil Code of 1870, that the term be certain.

scription still applicable to the mineral sale,[128] but this is conjectural. However, it would appear that the *Glassell* decision—given its broad effect—may make it now possible for an oil reservoir to be kept out of reach of commerce for an inordinately long period.

Of much more immediate concern to mineral lessees than the removal of a theoretical term limitation was the sudden atrophy of their right from a real one to a merely personal obligation. The oil producers sought relief from this new insecurity through the legislature, and in 1938 Act 205[129] was passed, providing that:

> ". . .oil, gas, and other mineral leases, and contracts, applying to and affecting such leases or the right to reduce oil, gas, or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, are hereby defined and classified as real rights and incorporeal immovable property, and may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of such rights, without the concurrence, joinder or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land."

[128] Daggett, in Mineral Rights in Louisiana, page 17 of the Revised Edition (Louisiana State University Press, 1949), says that it is her opinion that the life term of an unproductive lease would be confined by the court to the same ten year period as is applied to a sale or reservation of mineral rights.

[129] Act 205 of 1938, La. Statutes. See, as amended, 1950 amendment is referred to in note 146 infra), R.S. 9:1105.

The second section of the Act provided that:

> ". . .this Act shall apply to all such transactions whether entered into prior to the passage of this Act or not."

This statute met the urgent need of giving the holder of a mineral lease access to the petitory and other real actions. But its application raised a new problem: was this legislation but a statutory negation of the *Glassell* decision, with a correspondingly restricted effect, or was it a source of substantive rights in realty for the oil lessee? Were the previous Supreme Court decisions indicating that the mineral contract was more than an ordinary lease revived or was the *Glassell* holding still determinative in definition of the nature of the rights owned by an oil lessee?

Five months after the new legislation a Court of Appeals decision[130] held that a plaintiff claiming ownership in oil and gas leases could sue in the Parish where the land was located and need not sue the defendant at his domicile. The court said that it did not regard the *Glassell* decision as decisive in this jurisdictional question in view of the subsequent 1938 legislation. So far as the matter at hand was concerned, the court announced, oil and gas leases now occupied "the status or real property" and therefore it was proper to cite the defendant in the Parish where the land was situated.

[130] Payne, et al. v. Walmsley, 185 So. 88 (La. App. 1938). See also Nicholson v. Sellwood, 187 So. 837 (Ct. of App., 2nd Circ. 1939).

This enunciation by the lower appellate court doubtless resulted in the feeling in some quarters that the pre-*Glassell* opinions in favor of the real nature of the mineral lease now in effect were restored to life. However any such feeling must have steadily dwindled in the face of the line of Supreme Court decisions subsequent to the 1938 Act.

In the 1938 case of *Dejean v. Whisenhunt*[131] the Supreme Court held that parol evidence was admissible in connection with a suit involving a mineral lease, on the basis that the matter did not concern realty. The court said that the case was controlled by the law prior to the adoption of Act 205 and that by the jurisprudence prior thereto no real right was granted by the mineral lease. The court took the same stand again in 1939[132] concerning the admissibility of parol evidence in connection with mineral leases (citing the *Glassell* and *De Jean* cases).

In the 1940 case of *Tyson v. Surf Oil Co., et al.*,[133] the Supreme Court reiterated as firmly established the identity of mineral leases and the lease set out in the Civil Code. This opinion viewed Act 205 as having so limited an effect as not to reflect upon the nature of the lease *right* at all, and specifically cited as authorities for the interpretation as an ordinary lease the cases to that effect prior to 1938. In a concurring opinion, however, Roberts, J., declared himself to be out of accord with the majority opinion's attitude that Act 205 merely changed a remedy and had no substantive effect. He pointed out

[131] 191 La. 608, 196 So. 43 (1938).
[132] Hamill, et al. v. Moore, 194 La. 486, 193 So. 715 (1939).
[133] 195 La. 248, 196 So. 336 (1940).

that the enactment expressly defined and classified mineral rights as real ones. A real remedy, Roberts contended, cannot exist without its correlative real right. However, the majority of the court did not regard it as an unnatural thing that a party neither the owner nor possessor of real property could be afforded redress for an infringement upon real property.

Another 1940 opinion,[134] with O'Niell (the dissenter against the *Glassell* characterization of the mineral lease) speaking for the court, stated that a promise to assign oil and gas leases must be in writing, for the reason that such leases are incorporeal immovables as defined in Articles 470[135] and 471[136] of the Code. Even the narrowest interpretation of Act 205, as being but a "procedural" statute, supports this conclusion. Yet the 1938 and 1939 cases[137] concerning parol evidence in connection with oil leases had said that these mineral contracts were not even realty. In a 1947 holding[138] the Supreme Court reinforced this 1940 statement, saying that Act 205 had had the effect of placing mineral leases in the category of immovable property and real estate, in consequence of which a contract to transfer them had to be in writing.[139]

[134] Arkansas-Louisiana Gas Co. v. Roy, 196 La. 121, 198 So. 768 (1940).
[135] Article 470, Louisiana Civil Code of 1870, states that incorporeal things are placed in the class of the object—movable or immovable—to which they apply.
[136] Article 471, Louisiana Civil Code of 1870, states that: The following are considered as immovable from the object to which they apply: The usufruct and use of immovable things. A servitude established on an immovable estate. An action for the recovery of an immovable estate or an entire succession.
[137] See notes 131 and 132 supra.
[138] Davidson v. Midstates Oil Corporation, 211 La. 882, 31 So. (2d) 7 (1947).
[139] As required by Articles 2275 and 2462, Louisiana Civil Code of 1870.

Save for this concession of a limited effect by Act 205 upon the basic character of the oil and gas contract, the judiciary continued to express its feeling that the 1938 legislation went only to the remedies available to the lessee and not to the kind of right held by him. In 1942 a Court of Appeals decision[140] held that the royalty under a mineral lease was only "rent" and a Supreme Court decision,[141] over O'Niell's dissent, reiterated that mineral leases were ordinary leases to which the Codal articles applied.

Those cases subsequent to 1938 wherein the court recognizes mineral leases as being immovable property[142] would have seemed to indicate that the requirement of recordation in order to affect third parties[143] was applicable to such transactions. There had been, further, a 1920 decision of the court to that very effect.[144] However, the 1949 decision of *Arnold v. Sun Oil Company*[145] demonstrated that the contrary was the case. The Supreme Court, referring to Act 205 of 1938's classification of mineral leases as "real rights" and "incorporeal immovable property", said that such classification went no further than to extend to mineral lessees the procedural defenses already available to their lessors. This legislation, the court said, did not go so far as to create in the lessees "such a substantive right in the realty that they may, by reliance upon the public records, acquire a greater right

140 Hatch v. Morgan, 12 So. (2d) 476, (La. App. 1942).
141 Coyle, et al., v. North American Consolidated, et al., 201 La. 99, 9 So. (2d) 473 (1942).
142 See, in addition, Angichiodo v. Cerami, 28 F. Supp. 720 (1939).
143 See Articles 2264 and 2266, Louisiana Civil Code of 1870.
144 Baird v. Atlas, 146 La. 1091, 84 So. 366 (1920).
145 218 La. 50, 48 So. (2d) 369 (1949).

than an ordinary lessee could acquire, and a greater right, in fact, than their lessor possessed." This position was, of course, consistent with the judiciary's previous expressions giving Act 205 the most restricted effect possible. The subsequent legislation[146] which was energized by this holding is discussed in the Conclusion below.

In connection with the problem of "term" earlier referred to, several instances of mineral leases with terms longer than ten years have been before the Supreme Court since the Glassell case. In the 1946 case of *Hunt Trust v. Crowell Land and Mineral Corporation,*[147] the court recognized a twenty-five year period as the primary term of the mineral lease. This would appear to be in harmony with the concept of the ordinary lease, although the rationale here appeared to be that the contract subsisted beyond the first decade because it was kept alive by yearly renewals. In 1942, in *State v. Duhe,*[148] the State had sought to set aside a ninety-nine year oil and gas lease which it had granted, contending that it was a servitude and that the mineral lessees had permitted their rights to lapse through ten years non-user. The court held that the lease could not be cancelled, but its conclusion was based upon the idea that this would be unconstitutional interference with the right of the legislature to dispose of State property. The court specifically described this as a special case to which the general laws did not apply.

146 Acts 6 and 7 of the Second Extraordinary Session of 1950.
147 210 La. 945, 28 So. (2d) 669 (1946).
148 201 La. 192, 9 So. (2d) 517 (1942).

Two earlier cases featuring long terms may be of renewed interest with the apparent removal of liberative prescription from the picture. In the 1905 case of *Martel et al v. Jennings-Heywood Oil Syndicate*[149] the lease contract provided for a term of ninety-nine years. The contract was found not binding upon the parties, but the basis for the decision was the presence of a potestative condition. Of course, the ninety-nine years during which the lessee was free to postpone his search might be viewed as a component in the potestative condition, however, the contract having been made during the infancy of the industry, there was no "consideration" in the form of bonus or rentals, to sufficiently modify the relative freedom of the lessee from obligations to the lessor. In *Bristo v. Christine Oil & Gas Company,*[150] a 1916 case, the mineral lease was held to be null because it did not have a fixed term. Other jurisprudence, as might be expected, coincides with this.[151]

Although a few cases have appeared to give Act 205 of 1938 a substantive effect,[152] most of the Supreme Court's decisions following that legislation made clear that the court regarded it as merely procedural.[153] The sum of those pronouncements characterized the oil and gas lease as still analogous to the bucolic Civilian rental of a house

149 114 La. 351, 38 So. 253 (1905).
150 139 La. 312, 71 So. 521 (1916).
151 Atlas Oil Co. v. McCormick, 158 La. 278, 103 So. 767 (1925), Williams v. McCormick, 139 La. 319, 71 So. 523 (1916). A number of other decisions to the same effect were decided by the court in close proximity to the time of the Bristo case.
152 As, for example, Payne v. Walmsley, note 130 supra, and Arkansas-Louisiana Gas Co. v. Ray, note 134 supra.
153 See, in addition to the Louisiana decisions previously cited in this connection, Coastal Club v. Shell Oil Co., 45 F. Supp. 859 (Dist. Ct. La.).

or fig orchard, despite the new legislative label identifying it as "immovable property."

d. Conclusion.

The continuation of the restrictive attitude of the Supreme Court towards the rights owned by mineral lessees, particularly as expressed anew in the *Arnold v. Sun Oil* decision, prompted the passage, in the Second Extraordinary Session of 1950, of two more statutes. Act Number 6[154] specifically set forth that the provisions of Act 205 of 1938 should be considered as substantive as well as procedural. Act Number 7[155] provided that, with reference to the registry laws requiring recordation in order that third parties be affected, such "third parties" were redefined to include mineral lessees.

One might have thought that finally the oil and gas lease had acquired full citizenship as a real right in the Louisiana property hierarchy and that its characterization as a peculiar kind of personal contract, if it had not been ended by the 1938 legislation, now was certainly concluded. When the Supreme Court's answer came in 1952 it was firmly in the negative. Its decisions in the *Glassell* line were to continue to be firmly determinative of the mineral lease's status.

In *Milling v. Collector of Revenue*[156] the court reiterated its position, as expressed in 1942 in the *Coyle* case,[157] that

154 R.S. 9:1105, as Amended in 1950; 2nd Ex. Sess., No. 6, Sec. 1.
155 R.S. 9:2722; 2nd Ex. Sess., No. 7, Sec. 2.
156 220 La. 773, 57 So. (2d) 679 (1952).
157 Note 141, supra.

it was "well established that mineral leases must be construed as leases, and that the codal provisions applicable to ordinary leases must be applied." In 1954, in *Dixon v. American Liberty Oil Co.*,[158] the court in a single paragraph put into focus its regard of the 1950 legislation and its effect on the *Arnold v. Sun Oil* decision: ". . .A mineral lease is not a servitude and does not produce the same legal effect for, though it is characterized as a real right in LSA-R.S.9:1105, it is merely a contract which permits the lessee to explore for minerals on the land of the lessor in consideration of the payment of a rental and/or bonus. It places no charge whatever on the land and cannot be put in the same classification as a mineral servitude, which is an incorporeal immovable that attaches to the land itself. See *Arnold v. Sun Oil Co.* and the cases there cited." The following year, in *Perkins v. Long-Bell Petroleum Co.*,[159] the court rejected what it described as an attempt to assimilate a mineral servitude with a mineral lease and place them on the same plane. "That they are different and produce diverse legal effects," it said, "is no longer an open question in this court."

Thus, it appears that however arguable might be the merit of the court's characterization, it now has acquired —in these post-*Glassell* years—a hard, gem-like consistency and, not having softened in the face of a bit of legislation, appears unlikely soon to change. This is not to say, however, that the 1950 legislation is without any effect. In addition to the added protection given lessees by the recordation provision, the re-affirmance of the lease as a real right raises again the possibility that the

[158] 226 La. 911, 77 So. (2d) 533, 537 (1954).
[159] 227 La. 1044, 81 So. (2d) 389 (1955).

concept of lesion may be applicable,[160] the protection afforded a purchaser of immovables by way of warranty against eviction may apply,[161] and ambiguities in the contract may be construed against the "seller".[162]

Although the court remains adamant in its position that the oil and gas lease is not a servitude, the legislation has moved it so close to that category that there is little separating it other than the court's opinion. To the extent that it may be regarded as having moved in that direction, the question of liberative prescription for non-user re-appears.

So far as the mineral lease resembles anything in a code which was developed in a comparatively primitive economy, it most closely resembles the servitude. The analogy to the Civilian lease, unleashed in the *Glassell* case, was an unreal one. Maintained, as it has been, following statutes underlining the real nature of this transaction, it appears even more artificial and disorderly. On the other hand, the 1938 and 1950 legislation offered a good basis for returning to the earlier identification as servitude. If it provides a somewhat imperfect analogy, the servitude concept is nonetheless closer and more realistic than that of Civilian lease.

However, if it may be said that the Supreme Court's classification is an unsatisfactory one, it is equally true that the legislature—possessing as it does the power to

[160] See notes 33 and 37 supra.
[161] Article 2501, Louisiana Civil Code of 1870. See also note 41 supra.
[162] See note 35 supra.

create—has not done all that it might have. For, although closer in its nature to a servitude than it is to a Civilian lease, the oil and gas lease is in fact neither. It is something new and distinct in itself—a development of the gasoline-engine era. Accordingly, it deserved a comprehensive and examined legislative characterization—a project once begun but left uncompleted by the lawmakers.

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January 27, 1989

8/29/89

Dear Mr. Garrison:

I have just finished your book, "On the Trail of the Assassins" and am speechless. With each turn of the page I was shocked again and again.

I was 16 years old when Kennedy was murdered and even at that age I wanted to know what really happened. I would listen to my parents and teachers and some would say that we wouldn't really know the truth for at least some 25 years. All I can say is thank you for everything you've gone through to find out the truth.

I now have children and I sincerely want them to also know the truth, but I'm afraid that their textbooks will not provide for them what you have found to be true.

Please, let me know if there is anything I can do to right this terrible wrong.

An interesting side note - I have recommended your book to everyone I know and although they show interest in the subject, it seems theres no follow-through. I can't believe they can stick their heads in the sand like that.

Sincerely,

Susan

Susan Svetlik
400 N. Elmhurst Ave.
Mt. Prospect, IL 60056

8/28/89

2/9/89

Dear Judge Garrison,

I just finished reading your book: On the Trail of the Assassins, and I don't know where to begin!! Please bear with me on my emotional out-pouring!

First of all — Thank you for publishing and exposing what I've believed for years to be the truth! From my own experience, I've felt deeply about this outrageous act & have lived through remarks from others about my "pre-occupation", "we'll never know the truth", "as in the past, you can't do anything about it now", & on & on. I've often wondered, doesn't anyone else care about the truth? It's the principle of the thing.

Secondly, I'm still relatively young (34) and was 9 years old on Nov 22, 1963. From that second on my life was never the same. I've internalized this tragedy to the point of near obsession. The naivete and apathy of the American people astounds me. Believe me, when I read your book it validated me. Many of the

things you wrote about, I've been saying to people for years. I know many thought I was paranoid, off-in-left field or Communist. The very idea that elements of our government, (CIA et al) and by saying so, met with disgust and some anger. I'm sure I don't have to convince you of the treatment I've gotten for my ideas. I'm sure you've suffered all sorts of abuses and "set-ups" — as you mentioned in your book. I have no doubt in my mind everything you've said is true — and probably lots more you didn't write about.

I think I've read every book ever written about the Kennedys and the assassinations of each. Strangely enough I've never read the Warren Report (a waste of time) propaganda.

I guess with all the appeals on TV this past November, and the tears of loss they brought, it just renewed my energy to write or speak out again. Too many, obvious discrepancies.

sprung up. For the first time in my life I saw the entire Zapruder film in a PBS special: "Who Shot President Kennedy?" If that didn't show to me - or anyone - President Kennedy was shot from the frontal area - well But, all these things were explained away with computer enhancements etc etc. I'm not buying it.

My husband is in the Navy, and I also read "Best Evidence. Because of my Navy experience, it made sense to me why they'd want the body under a Military jurisdiction. Better able to continue "under orders" - careers made, broken.

I'm sorry if this letter seems like a rambling bunch of anger & thoughts. Writing in College was never my strongest area. However the emotions, anger to be just welling up the more I write.

I know you've been active for years on this case - Please continue to be vocal

as you're in a position in society where you can lend credibility to the truth. You're highly visible, too. I hope there's many more like me out here who don't believe the spoon fed propaganda the government, media & "officials" have tried to feed us. My experience is not too many people care anymore. I certainly do more so now than ever before.

Please continue speaking out.

Believe me, I'm no crackpot, although this letter is quite emotional. I just finished reading your book. And I just can't contain myself! I was so glad to find someone of stature who had come to the same conclusions I have!!!

Is there anything I can do? Where can I go to obtain a copy of the Zapruder film? Are you still involved in investigating these strange occurences? I.E. Bobby Kennedy's assassination. Is that also connected to

Tell your friends

the Presidents?

I will close this for now and mail it before I lose my nerve. I've always intended to write a letter of support to those who are working to uncover these injustices but never did. This time I had to.

Thanks Again.

I honestly hope your message continues to go out, but more importantly HEARD!

There are some of us out here who care about the truth.

God Bless You

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COMMODITY TRADING ADVISER

8/29/89

February 8, 1989

Judge Jim Garrison
Civil Courts Building
421 Loyola Avenue
New Orleans, LA 70112

Dear Jim,

I have just finished reading your latest book entitled "On the Trail of the Assassins".

Words cannot describe the gratitude I feel for your years of hard work in the face of the united opposition of the federal government and the media. You have done the nation a service for which you will be remembered forever.

I am trying to get everyone I know to read the book. If you have any other ideas as to how the truth may better be spread, I hope you will let me know.

May I also encourage you to write another book if and when additional facts become available.

Cordially,

John P. Truesdell

COUNCIL FOR EDUCATION IN THE SCIENCES, INC.
77 HOMEWOOD AVENUE - ALLENDALE, NEW JERSEY
07401

January 26

8/29/89

Jim Garrison
Sheridan Square Press
145 West 4th St
New York NY 10012

Dear Mr Garrison :

As an associate of Richard Sprague I have known of your courageous efforts to get the truth about the CIA known.

Your book is one of the most encouraging developments in a long time and we are recommending it to our readers. Our Number One Priority as citizens should be the total elimination of the legal gangsters who have run this country and are now again in a position to ruin the world with the ascension of Bush & Co.

Blessings,

Lars Bogart

Vance / Lincoln Book

file

410 West Maple
Pocatello, ID 83201
March 29, 1989

The Honorable James Garrison
Louisiana Fourth Circuit
Court of Appeal
Civil Courts Building
New Orleans, LA 70112

Re: JFK case

Dear Judge Garrison:

In November, 1963 I was just completing several years' research on the conspiracy to assassinate Lincoln. The resulting book, MASK FOR TREASON, The Lincoln Murder Trial, was published in April, 1965 by Stackpole.

In effect, MASK described and demonstrated a precise formula for exposing high level political assassination plots. For the next couple of years I experienced the harrassment by mail, phone, etc. familiar to you in the late 60's.

The engineers of the JFK "replay" evidently assumed I would have applied the "formula" to their project and was therefore a threat. I was doing so - but got the message as to how unhealthy it would be to publicize anything close to the mark.

By now, the "official" version of the JFK crime is as firmly rooted in the history books as the "official" Lincoln version. I doubt if it will be changed in our lifetimes.

So, to my point: During your prosecution of Clay Shaw I was living in Orlando, and followed and admired your efforts. I felt I had material useful to your case but, in several tries, was unable to reach you by mail. At this late date it's academic, but I'd still like to make what I have available to you, beginning with a sample item I feel is essential to any realistic study of the case:

Rather than one continuous plot, beginning in early '63, there were two plots. The original plan was a genuine replay of the Lincoln scenario on the "lone assasin" theme. Oswald was the pre-motivated gunman, with George deMohrenschildt and Ruth Paine as control and baby sitter. It called for an attempt on JFK on June 1 in El Paso, where he was to speak on his way home from the Mexico junket for the Alliance for Progress.

?

By late May, Oswald's questionable marksmanship and general unreliability were obvious to the engineers (of whom Shaw may have been a minor one) and the plan was aborted. The new plan that took shape quickly put both planning, scheduling and execution in the hands of professionals. The cast was very large (with only three or four of the originals) and every contingency provided for, including a built-in cover-up.

For instance, since the parade route was to be kept secret till the last possible moment, snipers' nests were set up on all three of the main route through Dallas from Love Field to the Trade Mart. On a different route, the "lone assassin" would not have been named "Oswald." At the Book Building, events were far stranger than the "official" fiction or any of the speculations published so far!

In an article I read recently, you are quoted as not feeling LBJ was implicated in any way. I have evidence to the contrary that I'd like to send you. It's a brief analysis, based strictly on official documents published in the Warren Report volumes, meaning they're easy to check and verify if you have the set. The conclusion - the only one the pattern of evidence permits - was that LBJ was very deeply involved, if not the prime mover.

If you would like to look at this and other material along similar lines, I'd be most pleased to hear from you.

Respectfully,

Vaughan Shelton

Vaughan Shelton

10 February 1989

Carole J. Moore
918 Crestview Road
Vista, CA 92084

8/29/89

Honorable James Garrison
Louisiana 4th Circuit Court of Appeals
421 Loyolla Avenue
New Orleans, LA 70113

Dear Judge Garrison:

I was surprised and delighted to read your book, "On the Trail of The Assassins" recently.

Twenty five years ago (age 16) I along with my father (who pointed out to me the discrepancies in the Warren Report, were reading books, and following the many investigations which were trying to solve the Kennedy murder. My father and I followed your investigations (we read your books also and those of Mark Lane).

Now, I am a mother of four boys, and a paralegal in Vista, in San Diego County. I am also a volunteer with the San Diego Support Group for the Christic Institute. I hope you have heard about this law firm which is trying to bring to the public's conscience (in the civil trial court) the truth about the Contras and covert activities which our present government is trying to hide behind in the excuse of "national security".

As I learned about this case it brought to my mind all of the information I learned about the Kennedy assassination and how it really all ties together with the secret team at work presently in the Iran/Contra fiasco. Daniel Sheehan, the head counsel of the Institute has mentioned the ties that link some secret team members.

I have followed a few other court cases and incidences of complicity between different aspects of the justice system in the country. John Mattes, a former Federal Attorney, in Miami, experienced manipulation by the Justice Department (Ed Meese) in the case of Jesus Garcia, who was arrested on a weapons charge. The case was watched closely in Washington as Mr. Garcia worked with Clines, Hull, etc. in supporting the Contras. Mr. Mattes contacted Senator John Kerry when he learned of drug trafficking and gun running during his investigation. Mr. Kerry tried to get senators and administration officials interested in investigating this. Shortly afterward Mr. Hassenfaus' plane was shot down and the Iran/Contra mess was made public.

Senator Kerry's hearings (barely covered by the media) were stopped when documents he needed were national "securitized".

I am greatly disturbed by these maneuvers. The Christic Institute does have a good case against the defendants (29) but are being harassed in the one way that can really hurt them. Financially. Judge King (a Nixon appointee), granted the defendants motions for over $1 million in legal and court costs. This case is now in Appeal. The ruling on fees is based entirely on earlier erroneous rulings by King. The defendants must be worried about this case. The Judge seems to be dancing to their tune.

Aproximately 200 Briefs of Interest have been filed with the Appeals Court in Atlanta on the Christic's behalf. (Mr. Blakey has been helping out the Institute as he helped originate the RICO statute).

If this case is forced to be removed from the courts it will be a very sad thing for me personally. I have worked for a few years now trying to raise money (the Christic is a non profit group) and raise public awareness about the secret government. The press of course (as you know first hand) is not to agreeable to get involved in this matter. Though when the case was dismissed, last June, it received the only major media I have witnessed.

I enjoyed your book very much and agree with your explanation of the coup d'etat. I have wondered for many years about where you were and what you had to say after so many years.

I heard about your book through a friend and ordered it from a local book store. There are many of us who do know what is going on and will work to bring about a change through public awareness and education. We won't give up.

I have met, since helping the Christic Institute many wonderful people who are dedicated to changing the current national security state. ++

I am sorry to ramble on to you in this letter, but during my formative years I watched you as you tried to bring the truth to the court and to the public and have always wondered about you Mr. Garrison. Thank you for your personal perseverance and sense of justice.

Will you be doing speaking engagements?

Thank you again for your book. (I will be giving it a favorable review in our local support group newsletter).

I would enjoy a reply if you have the time to do so.

Sincerely yours,

Carole J. Moore

CAROLE J. MOORE
918 Crestview Road
Vista, CA 92083

cjm